Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO. 91-1465

MANOJ KUMAR D. PATEL,

Petitioner

VS.

ROBERT MILGRAM, M.D.,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION

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COUNTER-STATEMENT OF THE CASE

Respondent will not counterstate the case beyond what he deems necessary to correct the inaccuracies in Petitioner's statement.

Petitioner's assertions (Pet., 25-26) that the trial judge was insistent that the trial continue with only eleven jurors after it became obvious to all that juror no. 4 was in no condition to continue in service, that the trial judge persuaded Petitioner's counsel to agree to the judge's suggestions, that his counsel misguided him, that Petitioner did not agree to proceeding with eleven jurors, that (Pet., 48) the judge "was only interested to finish this case and wanted to get rid of it, so that he may not have to commute from Reading to Scranton" are, of course, unsupportable and, indeed, refuted by the official transcript of the

proceedings in chambers relating to the excusing of the juror and the agreement to proceed with the remaining eleven jurors. (A certified copy of the transcript is attached as an Appendix.) Any fair reading of that transcript cannot but result in the certainty that the trial judge handled the matter tactfully and with admirable judicial decorum. He first conferred with counsel to confirm that the juror was in fact incapacitated; he called the juror into chambers in the presence of counsel and, after interviewing her for a few minutes, excused her; next, counsel confirmed that they had spoken to their respective clients about whether to proceed with eleven jurors and advised the court that they and their clients were prepared so to proceed; finally, he called into chambers the parties themselves and asked them directly whether they wished to proceed with only eleven jurors and were

agreeable that the votes of ten jurors would constitute the verdict of the jury, and they -- everyone -- so agreed. Petitioner, while pro se, is an attorney and the suggestion that the judge somehow coerced the parties to continue notwithstanding the inability of the one juror to proceed and did so out of considerations of personal convenience is quite unpardonable. In any event, it is false.

No less false are Petitioner's assertions that Respondent's counsel had criminally conspired with Petitioner's treating physicians to the end of getting them to testify falsely at the trial against the interests of Petitioner, their former patient. In point of fact, only after having served a subpoena upon them to testify at the trial of this action did respondent's counsel, on the eve of the

trial, confer with them in regards to their medical treatment of Petitioner. Petitioner had previously given to respondent's counsel a signed medical authorization form which enabled him to obtain Petitioner's records from the physicians and the hospital. Contrary to Petitioner's assertions, respondent's counsel gave to Petitioner prior to trial copies of the records thus obtained.

Petitioner asserts (Pet., 48) that the trial judge failed to select 3 alternate jurors. Of course, the judge selected no jurors; the parties through their counsel selected the jurors. And two alternates, juror no. 25 and juror no. 28, respectively Richard Griggs and Richard Segiel, were chosen but, just before trial got underway, were excused by

agreement, leaving 12 jurors to begin the case.

Petitioner's attacks on the competency of his trial attorney seem to stem from Atty. O'Malley's alleged failure to advise him that he had a right under Pennsylvania law to a jury of twelve persons and therefore could, if he chose, move for a mistrial after juror no 4 was excused from continued service. But the transcript does show Mr. O'Malley advising Petitioner that the alternative to proceeding with the trial before eleven jurors was starting it all over again. Petitioner confirmed Mr. O'Malley's belief that he, Petitioner, did not want to start all over again on some later date before an all new jury. (Plaintiff's expert was on hand, was from New York, and had not "come cheap.")

Petitioner asserts that his treating physicians whom respondent subpoenaed "knowingly gave false testimony . . . to cover up and conceal their own Negligence and Medical Malpractice. . ." (Pet., 23) They did not have to worry about that because the statute of limitations had long since run on Petitioner's claims against them. Petitioner states (Pet. 22) that the case he brought against them and respondent in federal court "is still pending in the U.S. District Court, Scranton, Pa." It is not. Respondent herein was let out of that federal action on grounds of res judicata and an appeal therefrom to the U.S. Court of Appeals for the Third Circuit denied, as was a petition for reconsideration. The federal case against the other defendants has since been decided in their favor, on grounds that the limitations period had

run on Petitioner's claims against them.

Petitioner asserts that the jury's verdict was not unanimous. (Pet., 33) It was. The vote was 11 to 0. Moreover, in Pennsylvania, verdicts of juries in civil cases need not be unanimous. A 5/6ths jury division suffices, as will hereinafter be pointed out. Here, Petitioner stipulated that the votes of 10 of the 11 would constitute the verdict of the jury. All eleven jurors having found that defendant's negligence was not a substantial factor in bringing about plaintiff's complained of harm, a verdict was properly molded in favor of respondent and against Petitioner, to which molded verdict the eleven assented.

Petitioner complains of the trial court's failure to grant a mistrial (Pet., p. 1, 6, 26), incorrectly implying that

such motion was made. None ever was. Indeed, certain of his complaints of ineffective assistance of counsel are to the effect that his attorney, Todd O'Malley, Esq., of Scranton, Pa., "failed to ask the judge to declare a MISTRIAL" (Pet., p. 7) and "failed to object to incapacitated juror's being excused . . . he stipulated on the record to that juror's being excused . . . [and] agreed to proceed with eleven jurors." (Pet., p. 26)

Other numerous perceived misstatements of fact abound, not just in Petitioner's Statement of the Case but throughout. However, they seem to have little, if any, bearing on the question of what issues would properly be before this Court if certiorari were granted (Rule 15, .1) and are accordingly left unchallenged in the belief that the failure to

controvert them does not constitute an assent to their correctness.

SUMMARY OF ARGUMENT AGAINST CERTIORARI

Firstly, jurisdiction is improperly laid. While the Petition seeks certiorari to the Superior Court of Pennsylvania and while, indeed, the judgment sought to be reviewed is one entered in a state court action, Petitioner invokes jurisdiction "pursuant to 28 U.S.C. 1254." (Pet., 11) That provision confers jurisdiction upon this Court of appeals from judgments entered in the United States Courts of Appeals, not state courts.

Secondly, the Petition runs afoul of this Court's Rule 14, specifically subparagraphs .1(h) and .5 thereof. Seeking review of a state court judgment, Petitioner was obligated to specify the stage in the proceedings, both in the trial and state appellate courts, at which federal questions here sought to be reviewed were raised, how he raised them,

and the way they were passed upon, and he was bound as well to set forth such pertinent quotations of specific portions of the record as show that such federal questions were timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. This, respondent submits, has not been done and, notwithstanding Petitioner's pro se status, should not be excused, as Petitioner is an attorney. See Patel v. Sauquoit Fibers Co., 56 Pa. Commonwealth Ct. 279, 424 A.2d 621 (1981). Subparagraph .5 of this Court's Rule 14 provides that the failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying a petition for certiorari. The instant petition not only fails to present what is necessary in that

way but fails to present such federal questions as are suggested in accordance with subparagraph .1(h) at all.

Thirdly, the federal questions now sought to be raised have long since been waived by failure to raise them below. Not until now has Petitioner questioned the manner in which Respondent exercised his peremptory challenges and while, in his motion for post-trial relief, he complained of the trial proceeding before only eleven jurors, the record is clear that not only his counsel but he, himself, personally assented to that. In any event, as will be shown, such federal questions as are suggested are without application to this case.

ADDITIONAL ARGUMENTS FOR DENYING THE PETITION

Petitioners' complaints of deprivation of a state constitutionally secured right to a trial by twelve jurors in this civil action fall under the weight of unrecited facts and controlling law.

First, the Seventh Amendment's right to trial by jury in the federal courts has not been extended to the States through the Fourteenth Amendment. Olesen v. Trust Co. of Chicago, 245 F.2d 522 (7th Cir.), cert. den. 355 U.S. 896, 78 S.Ct. 270, 2 L.Ed.2d 193 (1957). A denial of a jury trial in a state civil proceeding does not violate the due process clause. Wagner Co. v. Lyndon, 262 U.S. 226, 232, 43 S.Ct. 589, 591, 67 L.Ed. 961 (1923). Nor does the equal protection clause require a jury trial in state civil proceedings: Letendre v. Fugate, 701 F.2d 1093, 1094

(4th Cir. 1983), cert. den. 464 U.S. 837, 104 S.Ct. 125, 78 L.Ed.2d 122 (1983).

Secondly, by rule of civil procedure promulgated by the Pennsylvania Supreme Court and at all times pertinent hereto in effect, the right to a jury trial in a civil case is waivable. Pa. R.C.P. 1007.1 (a) provides that:

> "In any action in which the right to jury trial exists, that right shall be deemed waived unless a party files and serves a written demand for a jury trial not later than twenty (20) days after service of the last permissible pleading. The demand shall be made by endorsement on a pleading or by a separate writing."

Thirdly, petitioner did not make such demand. None of the pleadings in the trial court are endorsed with a demand for jury trial. Moreover, no separate

document filed in the trial court ever demanded a jury trial. But for respondent's having inadvertently checked the wrong block in his Certificate of Readiness for Trial when ordering the case onto the trial list (as a result of which it found its way onto the jury trial list), the case would have been heard nonjury.

When respondent, in a conference in chambers on the date fixed for trial, moved to transfer the case to the non-jury list because neither party had made a jury demand in accordance with Pa. R.C.P. 1007.1, petitioner objected, respondent's Certificate of Readiness for Trial was examined, respondent's designation of a jury trial thereon noted, and petitioner's objection to the motion sustained.

Absent waiver, the right of a civil litigant in Pennsylvania to a jury of twelve is not settled. It is suggested by dicta in Smith v. Times Publishing Co., 178 Pa. 481, 36 Atl. 296 (1897) to be guaranteed by Art. 1, Sec. 6, of the Constitution of Pennsylvania and such is the express holding of one of Pennsylvania's intermediate appellate courts: Blum v. Merrell Dow Pharmaceuticals, 385 Pa. Superior Ct. 151, 560 A.2d 212 (1989). But, a petition for allowance of appeal therefrom to the Pennsylvania Supreme Court has been granted: 527 Pa. 614, 590 A.2d 755 (1991) and the matter still pends before the state's highest court.

Pennsylvania law does not require juror unanimity in civil cases. By a 1971 Amendment to the state constitution, that state's General Assembly was empowered to

provide, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. (Pa. Const., Art. 1, Sec. 6) The legislature exercised that authority by providing that "in any civil case a verdict rendered by at least five-sixths of the jury shall be the verdict of the jury and shall have the same effect as a unanimous verdict of the jury." Act of July 9, 1976, P.L. 586, No. 142, as amended, 42 Pa. C.S.A. 5104.

In a civil action wherein, after trial was begun, one of the jurors requested to be excused because his mother had been rushed to the Intensive Care Coronary Unit of a hospital the night before, and wherein the parties stipulated that the trial should proceed with only eleven jurors remaining and that a verdict of nine of the eleven should constitute the verdict of the jury, the trial judge's

refusal to charge the jury that the votes of 10 of the 11 remaining would be required for a valid verdict was affirmed in Kardibin v. Associated Hardware, 282 Pa. Superior Ct. 586, 426 A. 2d 649 (1981), the court concluding that the parties were free to stipulate to a verdict of less than five-sixths. In the instant case, the parties stipulated that the votes of ten of the eleven jurors would constitute a verdict and all eleven found that respondent's negligence was not a substantial factor in bringing about the harm of which plaintiff complained.

Petitioner complains that respondent's "attorney has used a peremptory challnges (sic) to remove the hispanice (sic), black and Asian American potential jurors from jury pool." In point of fact, the "pool" consisted of 40 veniremen. Twelve jurors and two

alternates were to be chosen. Each party was allowed four peremptory challenges. Respondent's attorney's first "strike" was of juror #21, one Mamie Riviello. On voir dire, she revealed that either she or a family member had been a patient of Dr. Friedman, once a co-defendant in this action and the physician with whom the respondent was affiliated at the time of the alleged negligence complained of. The ailment for which Friedman had treated was club feet. Friedman's efforts to correct the condition were unsuccessful. She was stricken because of respondent's fear that she might not be impartial in a malpractice action against Dr. Friedman's associate. The second peremptory challenge was of juror # 33, one Pearl Hannah Willner who, on voir dire, spoke of knowing Dr. Friedman and of being involved as a plaintiff in a medical malpractice case in 1974. Respondent

struck her because he felt that he did not need as a juror a person who had figured as a plaintiff in a previous malpractice case. Respondent's third strike was of juror #26, one Teresa B. Edwards who, on voir dire, stated that her husband was disabled and that either she or he (notes not clear) had had skin grafts. Respondent struck her because there would be much said at trial by plaintiff and his witnesses about his medical disability and because of the juror's exposure to skin grafts. Undue sympathy toward a disabled plaintiff with skin problems was feared and the challenge exercised. Respondent's fourth and last peremptory challenge was of juror #10, one Marykaye A. O'Malley. Her occupation was listed as a nurse's aide and she bore a last name identical to that of Petitioner's trial counsel who is a member of a large O'Malley "clan" in the Scranton area. Respondent was taking no

chances. That is who were stricken and why they were stricken. None of them was of a "cognizable group" respondent was interested in excluding. In particular, none was recognized as Hispanic, Black or Asian American. Thirty-six other persons constituted the jury pool, the last names of whom are, in order, Beagle, Anderson, Rinaldoni, Kareha (the juror who took ill and was excused), Hanley, Toth, Wojciechowski, Stas, O'Gara, Gawrych, Castrogiovanni, Rogan, Murphy, Pliss, Randel, Bird, Dobroski, Kosack, Severe, Harrison, Bowen, Mullisky, Griggs, Portanova, Segiel, Kranick, Smith, Krupka, Furdin, Watkofsky, Jugan, Lapinski, Turner, Singer, McGuigan and Cook. While respondent's counsel does not represent that none of these was either Hispanic, Black or Asian American, he does not remember recognizing any as such and had no occasion to exercise his peremptory

challenges out of the motivation ascribed to him by petitioner. Petitioner's assertion that respondent's peremptory challenges were exercised out of such motivation is a desperate, unfortunate and sad last grasp for a federal question holding feint promise of entree to this Court. In any event it is false.

While respondent recognizes that the use of a peremptory challenge, based on race, of a juror in a civil case pending in federal court for the purpose of excluding cognizable groups from service on petit juries has been held violative of the equal protection rights of the juror and to give rise to a right in the peremptory challenger's opponent to complain thereof [Edmonson v. Leesville Concrete, 500 U.S. __, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991)] and further recognizes that an argument can be made

that the same fate might await a similar use of such peremptory challenges in state courts [although if a right to a jury in a state court civil action is not federally secured, it is difficult to understand how either trying such an action to less than twelve jurors or exercising one's right of peremptory challenge of a juror affects federally secured rights], respondent notes that Thad Edmonson, during voir dire, asked the District Court to require his opponent to articulate a race-neutral explanation for striking two of the panel's three black jurors. In the case at bar, Petitioner at no point prior to his Petition for Certiorari complained of respondent's exercise of his peremptory challenge rights. Surely, Petitioner has waived any right he had to level such a charge. In Pennsylvania, it is a prerequisite to appellate review of even fundamental error that a timely objection

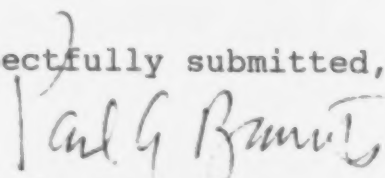
be made and thereafter continually preserved: Reilly by Reilly v. Southeastern Pa. Transp., 507 Pa. 204, 489 A.2d 1291, 1296 (1985):

> "In order to preserve an issue for appeal, a litigant must make a timely, specific objection at trial and must raise the issue on post-trial motions. Issues not preserved for appellate review cannot be considered by an appellate court even though the alleged error involves a basic or fundamental error. . ."

CONCLUSION

For the reasons that this Court's jurisdiction has been improperly invoked, this Court's Rules not adhered to, and the rights sought to be established waived, it is submitted that the Petition for Certiorari should be denied.

Respectfully submitted,



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March 30, 1992

CERTIFICATE OF SERVICE

I, Paul A. Barrett, do hereby certify that I served two true and correct copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the Superior Court of Pennsylvania upon Plaintiff by forwarding same via first class mail, postage prepaid, this 30th day of March, 1992, addressed as follows:

Manoj Kumar Patel
3152 Kennedy Blvd.
Jersey City, NJ 07306

Paul A. Barrett

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN CHAMBERS

BY THE COURT: We are now in the retirng room. During the recess it appeared that juror number four, Ellen M. Kareha, 517 Mary Street, Old Forge, Pa., who is listed as thirty-two years of age, may be ill, and because of the illness -- which she has not affirmatively indicated to either a tipstaff or anyone else, to our knowledge -- nevertheless,it appears that she does have some condition which may render her unable to continue her services as a juror in this case. This would mean that we only have eleven jurors if she is excused, and I would appreciate receiving communication of counsel at this time regarding this situation. It would appear that she has been, from time to time, inattentive, at least, from her physical appearance, by tilting her head, and so forth, while in the jury box, and she did have some difficulty in leaving the jury box during the course -- or, at least, at the start -- of this recess. Any comments from counsel?

BY MR. O'MALLEY: I would concur with the court's observation of the juror. I have had an opportunity to observe her, particularly during the cross-examination of Mr. Barrett, and she did appear extremely inattentive, to the point where it appears that she is sleeping, or having difficulty paying attention at all to what's going on.

BY MR. BARRETT: I would indicate, your Honor, that while I haven't been watching her too carefully, I did notice the difficulty she had in removing herself from the courtroom at the recess; as a matter of fact, she would not have made it out of the jury box without the aid of the tipstaff, and I know that I spoke to my client before I came in here, and I specifically asked him if he would be willing to hear this case before a jury of eleven, and he has authorized me to say that he would.

BY THE COURT: Have you had an opportunity to speak with your client, Mr. O'Malley?

BY MR. O'MALLEY: Yes, your Honor. My client feels the same. I think it would be better to have her

excused, too, if the court doesn't have any objection.

BY THE COURT: I assume, then, that the rule that five-sixths of the jury would not necessarily be applicable -- five-sixths of eleven -- but, rather, any jury verdict would require the agreement of ten of the eleven jurors. Do we agree on that, gentlemen?

BY MR. O'MALLEY: Yes, we do, your Honor.

BY MR. BARRETT: In other words, your Honor, we are not changing it at all. In other words, that's what it was before the excusal of this juror, and that's what it remains. In other words, you need ten for a verdict?

BY THE COURT: That's correct. I don't know what five-sixths of eleven would be. We would have to cut somebody in fractions. So is it agreed that any verdict here would require all ten jurors to agree, of the eleven?

BY MR. O'MALLEY: Yes, your Honor.

BY THE COURT: Is that agreeable?

BY MR. BARRETT: I don't know that I've had it before, but, yes, I guess that's agreeable. It's

agreeable, let me put it that way.

BY THE COURT: Is there some other approach, counsel, a suggestion that could be adopted?

BY MR. O'MALLEY: I have none.

BY THE COURT: In other words, we're in the same position as we were before. It requires ten jurors to arrive at a verdict.

BY MR. O'MALLEY: That's correct,your Honor.

BY THE COURT: If we lose another one,then it requires a unanimous verdict unless we reconsider it, but, at this point, it would require ten jurors to agree on a verdict. Is that agreeable with everyone?

BY MR. O'MALLEY: Yes.

BY THE COURT: If we approach it in that direction.

BY MR. O'MALLEY: Yes.

BY THE COURT: All right. I think that we should call the juror into the retiring room here, and I'll inform her that she's excused.

(ELLEN M. KAREHA, Juror #4, is brought into the retiring room.)

BY THE COURT: Let the record show that counsel for the parties are present.

Q BY THE COURT: Are you Ellen M. Kareha?

A Yes.

Q Do you live at 517 Mary Street?

A Yes, I do.

Q Where is that located?

A 517 Mary Street.

Q Is that in the Scranton area?

A Yes.

Q What particular part of Scranton is that in?

A A little bit below Scranton.

Q You appear to be rather tired and dozing off at certain stages of the testimony, and, as a result, it appears that you should be excused from any further service in the case, so you're excused. Everyone is very concerned about your welfare. We have noticed that you had a little difficulty in leaving the jury box, and you may not be feeling well, but whatever your condition is, you are excused, and

you don't have to serve anymore in this case, all right?

A Okay.

Q Thank you very much for coming in. Do you need any help in getting home?

A No.

Q Do you have a car?

A Yes.

Q Are you able to drive?

A Yes.

Q If you're ill, or need any help at all, we will notify the tipstaff because we are all concerned about your condition.

A No, I'm able to drive.

Q Are you feeling all right?

A Yes.

BY THE COURT: THank you.

(The juror is excused.)

+ + +

(Mr. Patel and Dr Milgram are brought into the retiring room.)

* * *

BY THE COURT: Let the record show that counsel are present in the retiring room along with the plaintiff and defendant. My understanding is that counsel have explained to the parties the situation involving the juror, who is Juror No. 4. Ellen M.Kareha. We have excused her from any further service by reason of her condition. It appears that she is suffering from some type of illness, and as a result this means that we only have eleven jurors. Because of the fact that we have eleven jurors this means that a unanimous verdict is not required in Pennsylvania in a civil case. If we had twelve jurors a verdict of ten jurors would be sufficient to return a verdict, or five-sixths. Since now we only have eleven, my understanding is that counsel have agreed that a verdict of a jury of ten jurors will be regarded as the verdict of the jury, the same as a unanimous verdict of twelve. Is that agreeable, and is there any question as far as the parties are concerned?

BY MR. O'MALLEY (to Mr. Patel): Do you understand?

BY THE COURT: Mr. Patel,do you understand?

BY MR. PATEL, Plaintiff: Yes.

BY MR. O'MALLEY: The alternative would be to declare this trial void and start all over again, and I don't think you want that.

BY MR. PATEL: No.

BY THE COURT: Is that agreeable with the doctor?

BY DR. MILGRAM: My understanding is the same, and I also agree.

BY THE COURT: Just so we understand, we all agree that a verdict of ten will be the verdict of the jury.

BY MR. O'MALLEY: Yes.

BY MR. BARRETT: Yes, sir.

BY THE COURT: All right.

+ + +

I HEREBY CERTIFY that the proceedings in chambers in the above case are contained in the shorthand notes taken by me, and that the foregoing is a transcript of said notes.

/s/ Jennifer Guidi

Jennifer Guidi, Official Stenographer.